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REMARKS

Entry of the amendments is respectfully requested. Claims 1-70, 75-77, and 79-81 have been canceled. Applicant reserves the right to pursue the canceled claims in a subsequent application. Claims 71-73 have been amended. Claims 71-74 and 78 are pending in the application. Favorable reconsideration and allowance of this application is respectfully requested in light of the foregoing amendments and the remarks that follow.

A Notice of Appeal is filed herewith.

1. Interview Summary

The applicant thanks the Examiner for her helpful telephonic interview, which was held on September 7, 2004. In the interview, the Examiner and applicant's representative discussed the inclusion of "effective amount" in the claims. The Examiner voiced her concerns over using "effective amount" with the entire genus of propionibacterium and indicated that when she earlier indicated that it was alright to use, it was in the context of a limited number of strains. Of the claims reciting "effective amount" only claim 71 remains. Claim 71 requires strain P169 and therefore has not been amended with respect to "effective amount" since this claim recites a specific strain and since the Examiner indicated that this language was alright in the context of a limited number of strains.

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The use of suitable controls was also discussed. The claims reciting controls have been canceled herein.

Also discussed in the Examiner Interview was the Examiner's request for clarity sake to include the genus and species of the specific strains recited in the claims. Claim 71 has been so amended.

2. Amendments to the Specification

The specification has been amended on page 10 to add the *date* on which the ATCC deposits were made. All other required information regarding the deposit was added in the last amendment and response.

3. Rejection Under §112, Second Paragraph

Numerous indefiniteness rejections remain. Specifically, claims 3-7, 9, 42-50, 52-54, 56, 58-64, 67, and 71-81 stand rejected under 35 U.S.C. §112, second paragraph, as being indefinite. Claims 3-7, 9, 42-50, 52-54, 56, 58-64, 67, 75-77, and 79-81 have been canceled, obviating the rejection of these claims.

Although claims 71 and 74 are included in the list of claims rejected under §112, ¶2, no specific indefiniteness problem with these claims are specified in the Office Action. Therefore, claims 71 and 74 are believed to be definite.

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Claims 72 and 73 stand rejected for using "delivered" without proper antecedent basis. Claims 72 and 73 have been amended to delete "delivered" and insert "fed" therefor. Thus, claims 72 and 73 are definite.

Claim 78 stands rejected for failing to further limit its base claim, since the testing step is allegedly unrelated to the feeding step. Applicant believes that this claim should not have been rejected on this ground, as it does not include a testing step. Therefore, claim 78 is not indefinite for this reason.

Claim 78 also stands rejected as being "vague and indefinite in that it cannot be readily ascertained how long the bovine is to be fed, since the amount fed and the period of feeding is not defined in claim 71." As noted above, claim 71 has *not* been amended to specify a specific amount of microorganism that is fed because it is believed that since a specific microorganism is included in this claim, it is not needed. As is also noted above, claims are to be read in light of "the claim interpretation that would be given by one possessing the ordinary level of skill in the pertinent art at the time the invention was made." The Rule 132 Declaration of Dr. Thomas Rehberger is incorporated herein by reference. In his Declaration, Dr. Rehberger states that one skilled in the art would, in light of the specification, interpret claim 78 as being definite and know how long and how much microorganism to feed the bovine to establish this population range. See ¶ 3 of Dr. Rehberger Declaration.

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In light of the cancellation of claims 3-7, 9, 42-50, 52-54, 56, 58-64, 67, and 75-77, and 79-81 and the foregoing arguments, withdrawal of the rejection of claims 3-7, 9, 42-50, 52-54, 56, 58-64, 67, and 71-81 as being indefinite is respectfully requested.

4. Rejection Under §112, First Paragraph

i. Written Description Rejection

The Office Action also includes a written description rejection of claims 3-7, 9, 42-50, 52-54, 56, 58-64, 67, and 70 due to the insertion of new claim limitations. Claims 3-7, 9, 42-50, 52-54, 56, 58-64, 67, and 70 have been canceled, obviating the rejection of these claims. Withdrawal of the written description rejection of claims 3-7, 9, 42-50, 52-54, 56, 58-64, 67, and 70 is requested.

ii. Enablement Rejection

Claims 71-81 stand rejected under 35 USC §112, ¶1 as not being enabled for lack of an appropriate reference to a deposit and a corresponding, appropriate declaration or averment. Claims 75-77, and 79-81 have been canceled, obviating the rejection of these claims.

For the remaining claims, in the last Response to Office Action, filed on February 18, 2004, the specification was amended to include a reference to the deposit and to

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include on page 21 an averment by applicants' representative. In addition, a Statement Under MPEP § 2406.06 was submitted with the response.

The current response amends the reference to the deposit to include the *date* on which the deposit was made, as this was missing. Therefore, all requirements related to the deposit have been fulfilled. If any other issue related to the deposit is outstanding, the Examiner is requested to contact the undersigned.

In light of the amendment to the specification, withdrawal of the enablement rejection is requested.

5. Previous Rejection of Claims 3-29 and 41-64 Based on the Prior Art

Applicants gratefully acknowledge that the rejections under 35 U.S.C. § 102(e) of claims 3-29 and 41-64 under 35 U.S.C. § 102(e) over Rehberger et al. (U.S. Patent No. 6,455,063) and under 35 U.S.C. § 102(b) over Ott et al. (U.S. Patent No. 5,139,777) have been withdrawn.

The Examiner is requested to confirm that the additional, alternative rejection under 35 U.S.C. § 103(a) as obvious over Rehberger et al. and Ott et al. (U.S. Patent No. 5,139,777) is also withdrawn, as these obviousness rejections are not discussed in the Office Action.

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CONCLUSION

It is submitted that original claims 71-74 and 78 are in compliance with 35 U.S.C. § 112 and each defines patentable subject matter. A Notice of Allowance is therefore respectfully requested.

Authorization is given to charge Deposit Account No. 23-2053 in the amount of \$490.00 for payment of the fee by a small entity for a three-month extension of time under 37 CFR 1.17(a)(3), which the applicants hereby request. Authorization is given to charge any additional fees or credit any overpayment in connection with this or any future communication to Deposit Account No. 23-2053.

The Examiner is invited to contact the undersigned by telephone if it would help expedite matters.

Respectfully submitted,

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